No. 12,506

IN THE

United States Court of Appeals

For the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, RECEIVER,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Petition for Leave to File a Motion to Vacate Order Striking Appellant's Petition for Rehearing En Banc and Reinstating Such Petition

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Appellees.

Petition for Leave to File a Motion to Vacate Order Striking Appellant's Petition for Rehearing En Banc and Reinstating Such Petition

To the Honorable William Denman, Chief Judge, and to the Judges of the United States Court of Appeals for the Ninth Circuit:

The petition of appellants Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, respectfully shows:

On January 30, 1952, this Court (Healy, Circuit Judge, Fee and Byrne, District Judges) entered an order striking the appellants' petition for rehearing en banc as being without authority in law or in the rules or practice of the court. A copy is attached as Appendix I.

On February 18, 1952, Judge Fee filed a dissenting opinion and suggested a rehearing en banc of all the Circuit Judges. A copy is attached as Appendix II.

Note: Emphasis is supplied unless otherwise noted.

This petition asks leave to file a motion to vacate the above order and to reinstate the petition for consideration and action by the court. A copy of the motion is attached hereto as Appendix III.

SUMMARY

In striking appellant's petition for rehearing en banc, two judges foreclosed consideration thereof by the members of the court.

This is a direct holding that no litigant is entitled to petition for a rehearing en banc, and that such a petition is to receive no consideration whatever.

It is submitted that this action is without support in law, and that a litigant is entitled under the law to (1) file such a petition, and (2) have it considered and acted upon by the court.

AUTHORITIES

Section 46(c) of the Judicial Code, enacted in 1948, provides:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, *unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in active service.* A court en banc shall consist of all active circuit judges of the circuit."

According to the reviser's note, this section "preserves the interpretation established by the *Textile Mills* case", i.e., *Textile Mills v. Commissioner,* 314 U.S. 326.

In *United States ex rel. Robinson v. Johnston,* 316 U.S. 649 (1941), the Supreme Court granted certiorari to this Court, and at the same time vacated this Court's judgment and remanded this case

> "for further proceedings, *including leave to petitioner to apply for a hearing before the court en banc.*"

citing the *Textile Mills* case.

This is a direct recognition of the right of a litigant to apply for a rehearing en banc.

We have been unable to find any authority for the proposition that a litigant may not apply for a hearing en banc, or that a court may strike a petition therefor, save *Kronberg v. Hale,* 181 F.2d 767, decided by this Court and cited here as authority for the action taken. Although certiorari was applied for and denied in that case, an examination of the moving papers discloses that this point was not raised.

ARGUMENT

This Court consists of all of the judges thereof (*Textile Mills v. Commissioner,* 314 U.S. 326), and it may sit en banc. Section 46(c) of the Judicial Code provides in terms that it may rehear cases en banc if "ordered by a majority of the circuit judges who are in active service."

If hearings en banc can only be had when ordered by a majority of the circuit judges who are in active service, it follows that a litigant is entitled to have the matter presented to such judges for consideration and action, and that a petition therefor cannot be stricken nor can it be denied by a panel consisting of one circuit judge and two district judges.

In *Independence Lead Mines Co. v. Kingsbury,* 175 F.2d 983 (1949), where a petition for rehearing en banc was denied by this Court, Chief Judge Denman, dissenting, stated (p. 992):

> "The attempt of two judges in a panel of three judges to deny a petition for rehearing en banc violates the law as established in United States ex rel Robinson v. Johnston, 316 U.S. 649, 650, 62 S.Ct. 1301, 86 L.Ed. 1732, and Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 333 et seq., 62 S.Ct. 272, 86 L.Ed. 249.
>
> * * * * * * *
>
> "In view of the Supreme Court decisions cited above, it is too obvious to need argument that two judges cannot thus assume to act on a petition addressed to seven judges."

The *Independence* case was followed by a note on the subject in 63 *Harvard Law Review* 1449. Speaking of that case, it is there said (1451):

"Indeed, since the three judges here could not under § 46 have ordered a rehearing, their action in considering the petition seems singular."

In the same note, the following appears (1450):

"Although it is perhaps impossible to have fixed and detailed criteria for the selection of the cases to be heard *en banc,* fuller development of the rules governing the procedure by which the hearings are granted or denied seems both necessary and practicable. * * * *perhaps formal petition of counsel, as in the instant case, is the most suitable method for initiating a hearing en banc in a particular case.* See Hearings before Subcommittee on Judiciary on S. 1053, 77th Cong., 1st Sess. 16, 40 (1941). * * * Section 46(c) merely provides that the court *may* sit *en banc* if a majority vote to do so * * * (only four out of nine justices enough, generally, to grant certiorari) * * * *The petition should, it seems, be entitled to such consideration that denial of the petition results only when a majority of the individual judges are unwilling to grant it.*"

PROCEDURE OF STRIKING PETITIONS

The procedure of two judges denying a petition addressed to the whole court seems not to have been repeated in this Court after the *Independence Lead Mines* case. Instead, in *Kronberg v. Hale,* 181 F.2d 767 (Feb. 1950), this Court (per curiam, before Judges Healy, Orr and McAllister) inaugurated the procedure of striking a petition for rehearing en banc "as being without authority in law or in the rules or practice of the court".

Twice in May of the same year an identical order was made on the authority of the *Kronberg* case by a panel consisting of Circuit Judge Bone and District Judges Goodman and Mathes. *Freuhauf Trailer Co. v. Myers,* 181 F.2d 1008, and *Northwestern Mutual Life Insurance Co. of Milwaukee v. Gilbert,* 182 F.2d 256.

The order in the instant cause, striking the petition for rehearing en banc, cites *Kronberg v. Hale* as authority. The order was that of but two judges, one circuit judge and one district judge.

We respectfully submit that the practice inaugurated in *Kronberg v. Hale* and followed in this case, i.e., striking the petition for rehearing en banc by the order of a majority of the court which heard the case, is not supported in law, or the rules of this Court and that it is not justified under the statute authorizing and recognizing rehearings en banc.

The statement that a petition for rehearing en banc is "without authority in law" is contrary to what the Supreme Court said and did in the *Robinson* case, supra. In remanding a cause to this Court so that a petition for rehearing might be filed and entertained, the Supreme Court necessarily construed the statutes as giving a litigant "authority in law" to file a petition for rehearing.

The statute (Title 28 U.S.C. Sec. 46(c)) provides for a rehearing en banc. Surely there must be a procedure whereby a litigant may request a court to take the action the law authorizes the court to take. Otherwise, two judges may prevent the other five from even being cognizant of the request for relief which the statute empowers the five to grant. And where two district judges are on the panel, two district judges could thereby prevent 7 circuit judges from granting a rehearing en banc, although only the circuit judges are qualified to pass on the question under Title 28 U.S.C., Section 46(c). *Commercial National Bank in Shreveport v. Connolly,* 177 F.2d 514 (1949), and *United States v. Sentinel Fire Ins. Co.,* 178 F.2d 217, 239 (1949).[1]

If it is error for 2 judges to deny a petition addressed to 7, it must be error for 2 to interpose an iron curtain between the litigant and the remainder of the court by striking out the petition.

As for lack of authority "in the rules of the court" for petitions for rehearings en banc, we submit that it is incumbent upon the court to provide a procedure whereby the authority granted by Title 28 *U.S.C.* Sec. 46(c) may be invoked. In the absence of an express provision in the rules, it would seem clear that a motion

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[1]In each of these cases there was a disagreement whether a retired circuit judge was entitled to vote. There was no disagreement to the proposition that a petition for rehearing en banc could be acted on only by circuit judges.

or a petition addressed to the court is a proper and appropriate procedure to set the machinery in motion. It is significant that there is no provision in the rules that such a motion or petition will not be received or entertained, or delegating authority to a panel to deny it or strike it out.

An application to a court for an order is by motion. *R.C.P.* Sec. 7(b)(1). It must follow that where a court is empowered to make an order, the litigant must have the right to apply for it, i.e., the right to file a motion or petition. The doors of courts must always be open to litigants to apply for orders which the court is competent to grant.

LEGISLATIVE HISTORY OF TITLE 28 U.S.C., SEC. 46(c)

Title 28 U.S.C. Sec. 46(c) was occasioned by a conflict between this circuit and the third. In *Lang's Estate v. Commissioner,* 97 F.2d 867 (1938), this Court held that there was no basis in law for hearings or rehearings en banc. The third circuit held to the contrary in *Commissioner v. Textile Mills Corporation,* 117 F. 2d 62 (1940). On certiorari in the *Textile Mills* case, the Supreme Court upheld the third circuit.

It was then felt that the procedure approved by the Supreme Court should find more explicit expression in the statute, and S. 1053 was introduced in the 77th Congress to amend Section 212 of old Title 28 U.S.C. This bill was not then enacted, but it was adopted in substance when the Judicial Code was revised in 1948, becoming Section 46(c).

On August 16, 1948 Mr. Henry P. Chandler, Director of the Administrative Office of the United States Courts, transmitted to the Courts of Appeal the Final Report of the Committee on Codification and Revision of the Judicial Code (Judge Maris, Third Circuit, Chairman). This report states the contents of Section 46(c) and adds:

> "These new provisions will call for changes in the rules of each of the Circuit Courts of Appeal."

It appears, however, that the rules of this Court were not changed as a consequence of the new Judicial Code, except as to the name of the court and the title of the Chief Judge.

In the hearings before the Subcommittee on Judiciary on S. 1053, 77th Congress, 1st Session, the following occurred:

> "Senator Danaher: * * * On whose motion would the court assemble en banc?
>
> * * * * * * *
>
> "Senator Danaher: Who is going to make a motion that the whole court sit on this case? The counsel in the case?
>
> * * * * * * *
>
> "Mr. Chandler: The counsel can make a suggestion of course." (p. 16)

Again:

> "Senator Danaher: Judge Groner, do you gentlemen of the bench have any thought to give us as to how we are going to let a majority of the circuit judges decide * * * when they are going to convene the court en banc?
>
> "Judge Groner: Well, I never thought of that. My own thought in the administration of my own court would be that it would not be done unless counsel requested it, or unless the court of its own motion * * * deemed it advisable * * *" (p. 40)

HEARING EN BANC PARTICULARLY APPROPRIATE IN THIS CASE

The present case involves unique and important questions of bankruptcy and taxes. The decision conflicts with the decisions of two other circuits, the Second and the Fifth, *George A. Fuller Co. v. Commissioner,* 92 F.2d 72, and the *Shreveport Bank* cases, *Commercial National Bank in Shreveport v. Parson,* 144 F.2d 231; *Commercial National Bank in Shreveport v. Connolly,* 176 F.2d 1004; *Connolly v. Commercial National Bank in Shreveport,* 189 F.2d 608.

The case was decided by a panel consisting of two district judges and one circuit judge, and the opinion of the court was written by a district judge. As Judge Fee points out in his opinion of February 18th, three district judges have written opinions

in the cause. Both of those sitting in the Court of Appeals concurred that the opinion written by the district judge below was wholly erroneous. Yet the two district judges writing opinions in the Court of Appeals have completely differed from each other as well as from the district judge below. And no circuit judge has written a line on the merits. Finally, one of the participating judges has suggested a rehearing en banc.

CONCLUSION

We respectfully pray for leave to file the attached motion to vacate the order striking the petition for rehearing en banc, and submit that the motion should be granted and the petition for rehearing en banc should be reinstated and submitted to the court for its action under Title 28 U.S.C., Sec. 46(c).

Respectfully submitted,

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San Francisco
March 7, 1952.

(Appendices follow)

Appendix I

[Caption omitted]

On Appellants' Petitions for Rehearing

Before: HEALY, Circuit Judge
FEE and BYRNE, District Judges

PER CURIAM

The petitions of the appellants and intervenors for a rehearing are denied. Insofar as the petitions seek a rehearing en banc, they are stricken as being without authority in law or in the rules or practice of the court. See Kronberg v. Hale, 9 Cir., 181 F.2d 767.

Appendix II

[Caption omitted]

On Appellants' Petition for Rehearing

Before HEALY, Circuit Judge, and FEE and BYRNE, District Judges

JAMES ALGER FEE, District Judge (dissenting and suggesting a rehearing en banc of all Circuit Judges):

This cause involves the disposition of over $21,000,000.00. The solution requires application of novel statutory language affecting the fields of bankruptcy and taxes. I have expressed myself heretofore and still feel that the findings of the lower court do not support the determination made by two judges on the panel here.

I am unable to agree with either the denial of rehearing or the striking of the petitions which ask for a rehearing by the full complement of Circuit Judges of this Court en banc. Two District Judges and one Circuit Judge constituted the panel which heard the case. As has been pointed out in this serious and important litigation, three District Judges have, respectively, ex-

pressed three widely divergent views, while no member of the Court of Appeals has written a line on the merits.

I therefore suggest to the Court of Appeals a rehearing en banc of all the Circuit Judges. For this there is precedent in this Circuit.[1] The practice, as I understand it, substantialiy accords with that of the Third Circuit,[2] which is admirable. Inasmuch as this might be the court of last resort in this case, it seems fairer to have the issues disposed of by Circuit Judges.

The Supreme Court of the United States at least once has given permission to an appellant to apply to this court for a hearing en banc, 316 U.S. 649.[3] In taking that action, reference was made to Textile Mills Securities Corporation vs. Commissioner of Internal Revenue, 314 U.S. 326.

(Endorsed:) Filed Feb. 18, 1952. Paul P. O'Brien, Clerk.

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[1]Judges Denman, Mathews and Stephens sat in Hopper vs. United States, 9 Cir., 142 F.2d 167, and Judges Wilbur, Denman and Healy sat in Crutchfield vs. United States, 9 Cir., 142 F.2d 170. At page 177 of 142 F.2d appears Circuit Judge William Deman's motion for a rehearing en banc of the Hopper case, supra, wherein it is stated that the cause is "now pending for rehearing in this Court." Accordingly, the rehearing of that case was held en banc before Judges Wilbur, Garrecht, Denman, Mathews, Stephens and Healy, being all of the Circuit Judges of this Court. Hopper vs. United States, 9 Cir., 142 F.2d 181.

[2]United States vs. Gallagher, 3 Cir., 183 F.2d 342, was heard by a panel of two Circuit Judges and one District Judge, and, upon suggestion of one of the Judges, was heard en banc by all Circuit Judges.

[3]See Robinson vs. Johnston, 9 Cir., 130 F.2d 202.

Appendix III

No. 12,506

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, RECEIVER,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MOTION TO VACATE ORDER STRIKING PETITION FOR REHEARING EN BANC AND REINSTATING SAID PETITION, AND PETITION FOR REHEARING EN BANC.

Appellants THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, RECEIVER, hereby move the court for an order vacating the per curiam order of January 30, 1951 striking these appellants' petition for rehearing en banc and reinstating said petition for action thereon by the Court.

The motion is based on the records of this Court and is made on the ground that rehearings en banc are authorized by Title 28 U.S.C., Sec. 46(c), that a petition for a rehearing en banc is an appropriate procedure under said section, and that appellants are entitled to the action on said petition of the Circuit Judges of the Ninth Circuit who are in active service.

And appellants THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, RECEIVER, hereby petition the court for a rehearing en banc of the decision of October 29, 1951.

Dated: March 7, 1952.

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